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SUPREME COURT, U.S.

No. 07-1111

IN THE

Supreme Court of the United States

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC. and REV. KEVIN BROWN,

Petitioners,

v.

THE CITY OF LONG BRANCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Third Circuit correctly interpret the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(b)(1) in accordance with the language of the Act and the unique facts of this case and in a manner which does not conflict with the decisions of this Court or the other Circuits?

2. Did the Third Circuit correctly affirm the denial of the Free Exercise, U.S. Const. Amend. I claim in accordance with current constitutional jurisprudence in that Lighthouse produced no evidence that its religious exercise was burdened or restricted by its exclusion from the Redevelopment Zone in the City, and, because the Redevelopment Plan is a neutral regulation of general applicability which survives rational basis review?

3. Is this case a poor vehicle for a decision of nationwide importance in this developing area of the law, in that its distinctive facts, the nature of the land use regulation involved and the court's specific reliance upon a New Jersey state statute render it unsuitable for national application and because numerous factual issues, such as whether Lighthouse is actually a valid church, remain unresolved and cloud the record?

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COUNTERSTATEMENT OF THE CASE

I. Overview

Petitioners-Plaintiffs the Lighthouse Institute and Reverend Kevin Brown [hereinafter collectively known as "Lighthouse"] commenced this suit against Respondent-Defendant City of Long Branch [hereinafter "the City"] seeking damages for its alleged inability to operate as a "church" at 162 Broadway, a property which Lighthouse purchased in 1994 in what has always been a commercially zoned area of the City and is now the heart of the City's Redevelopment Zone. Lighthouse presently seeks certiorari as to the Third Circuit's affirmance of summary judgment in favor of the City on Lighthouse's RLUIPA Equal Terms and Free Exercise clause claims concerning the City's Redevelopment Plan, adopted in October 2002.

II. The Parties

Respondent-Defendant, the City of Long Branch is a political subdivision of the State of New Jersey located in Monmouth County. The City has a population of approximately 35,000 and encompasses 26 square miles. The City hosts 33 churches, synagogues and other religious institutions which it permits in 90% of the City subject only to lot size, set backs and parking requirements, if any, for those zones. These areas can accommodate the religious use requested by Lighthouse. (App. pp. 563, 564, 568, 570).

Petitioner-Plaintiff Lighthouse describes itself as a "mission church" which seeks "to minister to the poor and disadvantaged in downtown Long Branch." However, the issue of whether Lighthouse is actually a church is unresolved and the Third Circuit did not address or rule upon the issue of whether Lighthouse is a bona fide religious entity.[1] Lighthouse concedes that the property has never been used as a religious institution and the record contains no evidence of a congregation, or that church services, Sunday School, youth meetings or other events were ever planned, advertised, undertaken or occurred. (App. p. 558). Lighthouse never possessed or applied for an independent tax exemption as a church/charitable organization during any period relevant to this litigation and has faced tax sale foreclosure on this basis. (App. p. 513). Lighthouse originated as a non-secular soup kitchen located at a rented property at 159 Broadway and the "church" at 162 Broadway is actually a retail store with an illegal upstairs apartment inhabited by Reverend Brown, which hosts internet sites including a solicitation to individuals to become "ordained" for a fee. (App. p. 566). Lighthouse's status as a church is presently the central issue in *Lighthouse Mission For Evangelism v. City of Long Branch*, Tax Court of New Jersey, Mercer County, at No. 005909-2005 [hereinafter "Tax Court Litigation"] which is presently pending before the Honorable Gail L. Menyuk, J.T.[2]

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[1] The Third Circuit simply ruled that Zoning Ordinance 20-6.13 violated RLUIPA's "Equal Terms" provision and remanded for Lighthouse to prove compensatory damage for a closed period.

[2] In *Lighthouse Mission For Evangelism vs. City of Long Branch*, Tax Court of New Jersey, Mercer County, No. 005909-
(Cont'd)

III. Lighthouse's property at 162 Broadway, Zoning Ordinance 20-6.13 and the Redevelopment Plan.

Lighthouse purchased 162 Broadway on November 8, 1994 at which time the property was located in the City's C-1 Commercial District and subject to Zoning Ordinance 20-6.13 which set forth certain uses permitted as of right or by Conditional Use Permit, including assemblies (App. pp. 81-83). Churches have never been listed as permitted or conditional uses in the C-1 District. Lighthouse was fully aware of this restriction

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(Cont'd)

2005, Petitioner-Plaintiff Reverend Brown testified at trial on January 10, 2008 that he and Lighthouse share a bank account and that he uses donations to Lighthouse for his personal expenditures, including credit card payments, liquor purchases, travel, clothing for relatives, meals and other non-"church" personal and business expenditures. (Tax Court Transcript, N.T., 1/10/08,. p .21, lines 10-12, p. 32, lines 1-20; p. 51, lines 8-12; p. 60, lines 1-18; p. 78, lines 14-17). Lighthouse has also admitted in the Tax Court Litigation that in lieu of obtaining its own tax exemption, it has been using a tax exempt letter on "temporary" loan from a local church, the AME Zion Church of Shrewsbury for the past decade. Contrary to its assertions in this case that it was unable to operate as a church at 162 Broadway, Lighthouse asserts the exact opposite in the Tax Court Litigation in which it maintains that it *has continuously operated as a church at 162 Broadway*. Judicial proceedings, court opinions and court filings from prior litigation between parties are subjects of judicial notice as matters of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); *Biomedical Patent Mgmt. Corp. v. California*, 505 F.3d 1328, 1331 (Fed. Cir. 2007); *Southern Cross Overseas Agency v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410 (3d Cir. 1999). F.R.E. 201(b).

at the time of purchase; the real estate contract for 162 Broadway reflects that the parties redacted the provision addressing zoning and building laws and prior to purchase the City rejected Lighthouse's mini grant application advising that Lighthouse's proposed use of the building may not be legal.[3] (App. pp. 497, 502).

Approximately one year after purchasing 162 Broadway, Lighthouse submitted an application in August 1995 seeking a use variance for several purposes, *but not as a church*. The Zoning/Planning Board advised Lighthouse by letter of August 21, 1995 that its application was incomplete and Lighthouse abandoned this application. (App. p. 509). Lighthouse 's subsequent applications for use as offices for the Lighthouse Institute and as a retail clothing store were granted by the City in 1997. Application for use as a pastoral residence was denied and ignored as Reverend Brown continues to illegally reside at 162 Broadway. (App. p. 512).

On April 26, 2000 approximately six years after purchasing the property, Lighthouse applied *for the first time to use 162 Broadway as a church.* Lighthouse has previously attributed any delay in applying for or

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[3] Contrary to Lighthouse's assertions and Judge Jordan's concurrence and dissent there is no evidence that the City thwarted Lighthouse's attempt to use the property as a "church;" the record shows that commercial zoning pre-dated the purchase of 162 Broadway in 1994 and was not enacted or enforced to frustrate Lighthouse's use of the property and that delays in the application process were caused by the inaction of Lighthouse or its attorney and Lighthouse's serial failure to submit even minimally compliant use applications.

obtaining church use during this period, not to the City, but to malpractice by its former attorney, defendant Falvo Law Firm, which has since settled out of this action. (App. p. 541). The April 26, 2000 application was denied in that the proposed use was not specifically permitted in the C-1 zone without a use variance, pursuant to Sections 345-30, 345-14 and 345-42 of the City of Long Branch Zoning Ordinance and it "would require prior approvals from the Zoning Board of Adjustment." (App. p. 514). Lighthouse did not seek a variance or appeal the decision.

On June 8, 2000 Lighthouse initiated this action in the Superior Court of New Jersey, Monmouth County-Law Division at No. MON-L-2729-00 alleging constitutional violations against the City and legal malpractice and other claims against defendants BCIC Funding Corp., Breen Capital Services, Inc., Abrams, Gratta and Falvo, P.C., Peter S. Falvo, John Does A-Z, and Eugene M. Lavergne. The City removed this case to the District Court of New Jersey, Docket No. 00-Civ-003366 (WHW). Lighthouse requested injunctive relief and filed a Statement of Damages requesting monetary damages of $11,000,000. for Lighthouse and $7,777,777. for Reverend Brown. (App. p. 551). Lighthouse filed its first Amended Complaint on October 23, 2000 following the enactment of RLUIPA in September 2000, to add claims under , 42 U.S.C. §§ 2000cc(a)(b)(1).

During the pendency of the federal court litigation, Zoning Ordinance 20-6.13 was superseded by the City's enactment of the Redevelopment Ordinance, No. 47-02 on October 22, 2002, approving the Broadway Redevelopment Program and officially designating

162 Broadway, Block 283, Lot 9 as part of the Redevelopment Program [hereinafter "The Redevelopment Plan" or "The Plan"]. (App. p. 84). This was the culmination of the City's long term redevelopment initiative which originated with an August 8, 1995 resolution authorizing investigation of the City's waterfront as an area in need of redevelopment pursuant to N.J.S.A. 40A:12A-5 and -6.

The overall purpose of the Redevelopment Plan is to enhance the City-wide quality of life, to strengthen retail trade and city revenue, increase employment opportunities, improve public facilities in commercial areas, improve the City's image, attract more retail and service enterprises, achieve shared parking and encourage mixed commercial and residential use in this blighted area. (App. p. 88). Among the objectives set forth in the City's Redevelopment Plan are to achieve redevelopment of an underdeveloped and underutilized segment of the City. Pursuant to the Design Guidelines various sectors are designated in specific areas to create a "symbiotic relationship" between the types of uses in the entire Zone and the abutting fringe areas. (App. p. 567).[4] The Redevelopment Plan was adopted without any legal challenge from Lighthouse.

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[4] In *City of Long Branch v. Brower*, Superior Court of New Jersey, Monmouth County-Law Division, No. MON-L-4987 (June 22, 2006) an eminent domain case presently on appeal to the Appellate Division, the court upheld the City's Redevelopment Plan (including the Broadway Corridor area) and the declaration of blight, as consistent with N.J.S.A. 40A:12A-5 and the substantial evidence. Lighthouse has been collaterally estopped from re-litigating the *Brower*

(Cont'd)

Pursuant to the Plan's Design Guidelines, 162 Broadway is located in the "Broadway Corridor" which is part of a Regional Entertainment Commercial Zone, a high end entertainment area anchored by two commercial performing arts theaters. (App. p. 622). The Broadway Corridor has a 100 year history of deterioration and the area in need of redevelopment, a high crime area with a scant population, consisted of vacant land, closed up businesses and adult entertainment uses. This sector specifically met the state criteria for redevelopment: city ownership, obsolete unused buildings, incompatible uses and conditions of the property (App. p. 565). Broadway is the main street and its revitalization as a vibrant entertainment and commercial destination has always been one of the most important objectives of the Redevelopment Zone. (App. pp. 580, 581, 622). Permitted uses include theaters, cinemas, restaurants, clubs and bars (App. pp. 582, 623). Houses of worship, social clubs, schools, athletic facilities and alternative use venues are not permitted under the Design Guidelines and this prohibition extends to pastoral residences. (App. p. 622). Contrary to the Third Circuit's misperception of the facts, which it confuses with Zoning Ordinnace 20-6.13, the City has *never* "substantially agreed" agreed that the Redevelopment Plan permits "non-religious assemblies." *See Lighthouse Inst. for Evangelism, Inc.*

(Cont'd)

determination in *Cottage Emporium, Inc. et al. v. Broadway Arts Center, L.L.C., et al.*, New Jersey Superior Court, Monmouth Count-Law Division, No. L-1786-06 (April 17, 2006) (presently on appeal to the New Jersey Superior Court-Appellate Division).

v. City of Long Branch, 510 F.3d 253, 262 (3d Cir. 2007). The Redevelopment Plan does not reference "assemblies" at all and instead lists specific primary and secondary permitted uses that are not "assemblies" by use or definition or any stretch of the imagination.

During this period of change from zoning ordinance to Redevelopment Plan, the District Court denied Lighthouse's Motions for Summary Judgment and Preliminary Injunction and partially granted the City and Falvo's Motions for Summary Judgment in April 2003. This decision was affirmed by the Third Circuit by non-precedential opinion dated May 28, 2004. *The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 Fed. Appx. 70, 74 (3d Cir. 2004), *writ of cert. denied*, 543 U.S. 1120, 125 S. Ct. 1061, 160 L. Ed. 2d 1067 (U.S. 2005).

The Redevelopment Plan set forth a new multi-step application process for property use in accordance with the newly adopted RFQ/RFP (Request For Qualification/ Request For Proposal) which included the requirement that developer status must be sought pursuant to the Plan's guidelines. (App. pp. 91,93). The RFQ application required a comprehensive description of the proposed development team leader and members and their respective roles as well as a description of the team's previous experience in projects relating to the development objectives for the sector. An applicant who was then selected to proceed to an RFP was required to submit even more detailed information including Conceptual Site, Acquisition and Financial Plans. Because of the nature of its application, Lighthouse was also required to seek a waiver of the prohibition on

church use, and such amendment to the Plan would allow all religious institutions into the zone (App. p. 594).

On November 11, 2003, Lighthouse (now as the Long Branch Center of Faith) sought a waiver to allow houses of worship in the Regional Entertainment Commercial sub-section of Redevelopment Zone 6, Lower Broadway. Lighthouse submitted a noncompliant RFQ application to be designated as developer for 162 Broadway, consisting of a one page letter which did not include *financial information*, the scope of the proposed development, information as to aesthetics or parking or otherwise meet the necessary criteria. (see Resolution, App. p. 226). By letter dated December 23, 2003 the Special Redevelopment Counsel advised Lighthouse that its RFQ Application was rejected because the proposed church use did not comport with the Redevelopment Plan (itself a sufficient reason for disqualification) and would disrupt the zone, and, because the Plan had been adopted without legal challenge from Lighthouse. (App. p. 226). The application was also rejected because the Plan specifically provided for an entertainment/commercial zone and the inclusion of a storefront church would jeopardize the entire development of the block on north and south sides of Broadway. (App. p. 226). The record shows that the presence of a house of worship in this high end entertainment and recreation section of the Broadway Corridor would destroy development of that block, because liquor licenses may not be issued within 200 feet of a religious institution pursuant to New Jersey statute N.J.S.A. 33:1-76 and local ordinance. (App. pp. 226, 566-567). The RFQ was also denied as incomplete. (App. p. 226).

Lighthouse appealed to the City Council and administrative hearings were held on April 27, 2004 and May 11, 2004 with the Mayor and City Council acting as the Redevelopment Authority. (App. pp. 555-609). The City presented as witnesses Assistant Planning Director of the City, Carl Turner, and the City Planning Consultant, Pratap Talwar. (App. pp. 562-596). Lighthouse presented no witnesses other than Reverend Brown. At the conclusion of the May 11, 2004 hearing, the Long Branch City Council voted unanimously to reject Lighthouse's RFQ/RFP applications and passed a Resolution denying an amendment to the Redevelopment Plan, accompanied by detailed factual findings. (App. pp. 226-232).

In its Resolution, the City Council found that the City had demonstrated through testimony uncontroverted by any expert, that there was a compelling governmental interest in restricting houses of worship in the Redevelopment Zone which requires special development pursuant to N.J.S.A. 40A:12A-1 et seq. The City also demonstrated that religious houses of worship would be totally incompatible with the permitted uses within the zone necessary to its rebirth, due to its status of being in need of rehabilitation. The Resolution stated that the restrictions of houses of worship within the City were the least restrictive means of furthering a compelling governmental interest as shown by the presence of 33 houses of worship and retreats within City limits, in diverse areas, and that religious uses can be occupied in approximately ninety percent (90%) of the physical areas within the City. The Resolution further stated that the approval of the Mission's RFQ/RFP was denied for two reasons: (1) the

use was not permitted in the zone; and (2) the RFQ/RFP were not complete such that a determination could be made from the sketchy application. The Resolution noted that even if use as a church were ruled permissible, Lighthouse would be required to complete its RFQ/RFP applications to show, as must all developers, that it is financially able to complete the project and that parking and aesthetic requirements of the zone are met among other things. (App. pp. 226-232).

On July 22, 2004 Lighthouse filed an amended complaint adding claims regarding the Redevelopment Plan. Lighthouse and the City filed cross-motions for summary judgment. By order dated December 27, 2005 the District Court granted summary judgment in favor of the City on all claims. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch Lighthouse,* 406 F. Supp. 2d 507 (D. N.J. 2005). Lighthouse appealed to the Third Circuit as to its Equal Terms, RLUIPA. 42 U.S.C. § 2000cc, et seq. and Free Exercise Clause claims, all of the other claims (and parties) having been dismissed or since dropped by Lighthouse.

By opinion of November 27, 2007 the Third Circuit court affirmed in part and reversed in part the District Court decision, with the majority opinion written by Judge Roth and Judge Jordan concurring and dissenting. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007). The Third Circuit affirmed the dismissal of Lighthouse's RLUIPA claim as to the Redevelopment Plan, holding that the Equal Terms provision of RLUIPA requires a plaintiff to show that it was treated less well than a

secular organization that has a similar negative impact on the aims of the challenged land-use regulation. The court reasoned that Lighthouse was not treated on less than equal terms than secular entities because a New Jersey state statute prohibits the issuance of a liquor license to establishments located within 200 feet of a church. The court also affirmed the dismissal of Lighthouse's Free Exercise claims because its religious exercise was not burdened by the fact that it was excluded from this area of the City and the court held that the Redevelopment Plan was a neutral regulation of general applicability.

The Third Circuit reversed the grant of summary judgment for the City as to Lighthouse's RLUIPA Claim as to Zoning Ordinance, 20-6.13 finding this ordinance to be violative of RLUIPA and remanded this claim for a determination of compensatory damages from the time Lighthouse sought a waiver (April 2000) to the date Zoning Ordinance 20-6.13 was repealed and superseded by the Redevelopment Plan (October 2002). This ruling is not at issue here.

During the pendency of this appeal, the City had commenced eminent domain proceedings against 162 Broadway by Order To Show Cause, in *City of Long Branch v. Lighthouse Mission, Inc., et al.*, Superior Court of New Jersey, Monmouth County-Law Division, No. L-4778-07 [hereinafter "Eminent Domain case"]. By final judgment of April 2, 2008, after allowing full briefing and argument, the court sustained the City's position. The court denied Lighthouse's challenges to the Redevelopment Plan and authorized the City to acquire 162 Broadway pursuant to the New Jersey

Eminent Domain Act. The court found that the City's redevelopment designation of the properties, including 162 Broadway, was supported by substantial evidence and was not arbitrary or capricious (Eminent Domain Opinion, p. 14). The Court also rejected Lighthouse's challenge to the City's condemnation authority under RLUIPA and designation of BAC as a developer and denied a stay to the eminent domain proceedings during the instant appeal. (*Id.*, pp. 20-23).

As the above narrative and footnotes show, the instant case is only one of many cases or claims involving the City, Lighthouse and Reverend Brown which are in various stages of resolution.[5] *See City of Long Branch v. Brower,* Superior Court of New Jersey, Monmouth County- Law Division, No. MON-L-4987 (June 22, 2006), *Cottage Emporium, Inc. et al. v. Broadway Arts Center, L.L.C., et al.*, New Jersey Superior Court, Monmouth Count-Law Division, No. L-1786-06 (April 17, 2006) and

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[5] Among these are *Reverend Brown vs. City of Long Branch, et al.*, in which Reverend Brown asserts claims for false arrest, false imprisonment, malicious abuse of process and intentional infliction of emotional distress via Tort Claims Notice (N.J.S.A. 59:8-4) dated April 24, 2006, arising out of his February 29, 2004 arrest for the aggravated sexual assault of Debra Bernstein on the Lighthouse premises at 162 Broadway and for his subsequent incarceration from March 1, 2004 through March 4, 2004. Reverend Brown's Tort Claims Notice was filed with the City Clerk of Long Branch, where it is available to the public pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1. This claim is not of record in this litigation but the fact of this filing is subject to judicial notice. *See Santa Monica Food Not Bombs vs. City of Santa Monica,* 450 F.3d 1022, 1025 (9th Cir. 2006)(proper to take judicial notice of certified public records on file with the City Clerk).

Lighthouse Mission For Evangelism v. City of Long Branch, Tax Court of New Jersey, Mercer County, at No. 005909-2005.

REASONS FOR DENYING THE PETITION

I. Introduction

Lighthouse attempts to woo this Court into acting as the Supreme Court of Zoning Appeals by creating false conflicts, spewing rhetoric and sidestepping the facts of this case. In reality, the Third Circuit's decision is legally sound and raises no conflicts or issues requiring review by this Court. Moreover, case law interpreting RLUIPA's Equal Terms provision and as to the Free Exercise clause in the religious land use context is largely in its infancy and would benefit from further development prior to intervention by this Court.

Any decision arising out of this case would lack nationwide application because of its unique factual pattern. The City's statutorily and judicially authorized Redevelopment Plan is at issue, not a run-of-the-mill zoning ordinance affecting a few blocks. Significantly, the Plan does not permit assemblies of any type in the subject area, religious or non-religious. Additionally, the resolution of this action below was largely based upon the relationship between a New Jersey State liquor licensing statute and the specific uses permitted and prohibited in the zone to further the Plan's objectives. Any universal application of this decision is remote.

This case is also a poor candidate for certiorari as it is rife with significant unresolved factual issues,

including whether Lighthouse is indeed a "church" as it claims. This action is also one of many in which Lighthouse and the City of Long Branch are opposing parties and in which Lighthouse has made assertions directly contradicting its allegations here. Lighthouse cannot consistently report or define its own envisioned use, much less show that it was treated discriminatorily by the Redevelopment Plan. Lighthouse's "spin" cannot disguise the fact that the actual record is devoid of any evidence in support of its statutory and constitutional claims.

II. The Third Circuit correctly interpreted the Equal Terms Provision of RLUIPA, 42 U.S.C. § 2000cc(b)(1) in accordance with the language of the Act, the unique facts of this case and in a manner which does not conflict with the decisions of this Court or the other Circuits.

A. The Third Circuit's decision that the Redevelopment Plan did not violate RLUIPA's Equal Terms provision is legally sound.

The Third Circuit affirmed the dismissal of Lighthouse's RLUIPA claim as to the Redevelopment Plan, holding that RLUIPA's Equal Terms provision requires a plaintiff to show that it was treated less well than a secular organization that has a similar negative impact on the aims of the challenged land-use regulation. *Lighthouse*, 510 F.3d at 264-266, 270.[6] This

[6] While urging that the Third Circuit's decision be upheld, the City wishes to reiterate that it does not agree that the Redevelopment Plan permits non-religious assemblies, as the (Cont'd)

determination that the Redevelopment Plan did not violate the Equal Terms provision of RLUIPA, 42 U.S.C. § 2000cc(b)(1) is in conformity with the applicable law and plain language of the Act.

The revitalization of the Broadway Corridor and dynamic redevelopment of this underdeveloped and underutilized segment of the City, has always been one of the most important objectives of the Redevelopment Plan. As set forth by the Design Guidelines, the primary permitted uses for this Regional Entertainment Commercial Zone in which 162 Broadway is located, are theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops. (App. pp. 94-97). Secondary uses are restaurants, bars, clubs, entertainment related businesses, and specialty retail. (App. p. 582). Houses of worship are not permitted under the Design Guidelines, *but neither are societies or organizations, schoolhouses, athletic facilities or alternative use venues* (such as public property to rent for events). The performing arts theaters permitted in the area are for commercial entertainment, not assembly venues for the public.

The Third Circuit appropriately reasoned that Lighthouse was not treated on less than equal terms than secular entities with respect to the aims of the Plan

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(Cont'd)
Third Circuit mistakenly believes. The Redevelopment Plan does not reference "assemblies," neither religious or non-religious assembles are permitted and the specific primary and secondary permitted uses are not "assemblies" by definition, use or comparison.

inasmuch as New Jersey statute N.J.S.A. § 33:1-76, prohibits the issuance of a liquor license to establishments located within 200 feet of a church. *Id.*, pp. 270, 271. The court recognized the difficulty the City would have in carrying out the objectives of the Plan to create an entertainment area full of restaurants, bars, and clubs, if "sizeable areas of the Broadway Corridor were not available for the issuance of liquor licenses." *Id.* Lighthouse's presence, unlike the permitted secular uses, would fundamentally thwart the objectives of the Redevelopment Plan to transform the Broadway Corridor into a sustainable high end commercial entertainment district. Consequently Lighthouse could not show that it was treated "less well" than a secular organization that has a similar negative impact on the aims of the challenged land-use regulation and its Equal Terms claim failed.

B. There is no conflict between the Third Circuit's decision and the decisions of this Court or the other Circuits.

Lighthouse argues that the Third Circuit's interpretation of the Equal Terms provision of RLUIPA as requiring an appropriate secular comparator, demonstrates a split among the Eleventh, Seventh and Third Circuits. To the contrary, the Third Circuit's interpretation is neither divisive or controversial and is simply faithful to the legislative history and express terms of 42 U.S.C. § 2000cc(b)(1).[7]

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[7] The Equal Terms provision states in relevant part:

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that

(Cont'd)

The Third Circuit logically looked to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L. Ed. 876 (1990), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993) and its own Free Exercise decisions in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), *Tenafly Eruv Association, Inc. v. The Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) and *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) for guidance in interpreting § 2000cc (b)(1). *Lighthouse*, 510 F.3d at 264. The Third Circuit held that an Equal Terms analysis must similarly consider the challenged regulation's objectives, thus, the effect of religious and an analogous secular conduct on those objectives. *Id.* at 266. As a consequent, all assemblies and institutions do not "travel" together under RLUIPA, and religious assemblies need not be permitted simply because a non-religious assembly is allowed. *Id.* at 267. The Third Circuit thus declined Lighthouse's invitation to adopt the Eleventh Circuit's broad definition of comparator, more expansive reading of RLUIPA and addition of a strict scrutiny requirement as set forth in *Midrash Sephardi v. Young Israel of Bal Harbor, Inc.*, 366 F.3d 1214 (11th Cir. 2004), which held that if a zoning regulation allows a secular assembly, religious assemblies must be permitted. *Id.*; *See also Vision Church, United Methodist v. Village of Long*

(Cont'd)

> treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

42 U.S.C. § 2000cc(b)(1).

Grove, 468 F.3d 975 (7th Cir. 2006) (RLUIPA Equal Terms plaintiff need not identify a nonreligious comparator that is "similarly situated in all relevant respects").

Although the Third Circuit's approach differs from that of the Eleventh Circuit, it is an evolutionary step in Equal Terms jurisprudence rather than a sharp departure from any conventional wisdom. It is simple logic that evidence of appropriate comparable or analogous non-religious uses, examined in context, are necessary in order to draw a meaningful comparison in treatment. The idea of looking to appropriate comparators is a commonsense application of a necessarily fact-sensitive inquiry. The Eleventh Circuit has itself acknowledged the need for such comparators in Equal Terms claims. As the Third Circuit observed, *Konikov v. Orange County*, 410 F.3d 1317, 1326 (11th Cir. 2005) has since limited *Midrash* to facial challenges by holding that a similarly situated secular comparator must be identified for as-applied challenges. *Id* at 268. Moreover, even in analyzing the *facial* violation claim in *Konikov*, the Eleventh Circuit resorted to comparators, stating that "[T]he family day care home is the only classification in the Code that is arguably *similarly situated* to a religious organization for the purpose of RLUIPA. Even assuming that both uses are assemblies, there is no violation because the classification can withstand strict scrutiny." 410 F.3d at 1326 (*emphasis added*).

Midrash, supra, and *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007) particularly illustrate how fact-driven an Equal Terms

analysis is and how factual differences can masquerade as conflicts. In *Midrash*, the Eleventh Circuit held that a challenged ordinance which permitted private clubs and lodges but excluded religious assemblies violated RLUIPA's Equal Terms provision. Crucial to the decision in *Midrash*, however, was the language of the ordinance itself *which defined the term "private club" as including assemblies*. 366 F. 3d at 1231. Another town ordinance *specifically grouped* churches and synagogues with "places of assembly." *Id.* Therefore the language of the applicable ordinances themselves, which expressly permitted private clubs and other secular assemblies but not churches or synagogues, provided that the synagogues and private clubs were comparators treated on less than equal terms. In contrast to the zoning ordinance in *Midrash*, the Redevelopment Plan does not permit either religious or non-religious assemblies or define "assembly hall" at all, much less as encompassing any of the permitted uses in the Redevelopment Zone. Unlike the ordinance in *Midrash*, the Plan does not "group" or otherwise define churches and other religious institutions as "assemblies" and specifically excludes alternative use venues.

In *Midrash*, the Eleventh Circuit also relied upon evidence that synagogue members regularly patronized area shops and congregations purchased food and supplies, thus contributing to the stated purpose of the town to promote retail activity and synergy in the business district. In contrast the record here showed that Lighthouse's presence at 162 Broadway would actively thwart the goals of the Redevelopment Plan, not further them, because of the constraints of the New Jersey liquor licensing statute. The primary and

secondary uses identified in the Redevelopment Plan are scrupulously designed to meet the goal of creating a high end entertainment district. Lighthouse has not presented any evidence to show that its proposed functions are in any way compatible with a high volume, high-end entertainment and recreation center or that its constituency (which it describes as "poor and downtrodden") would patronize the theaters, restaurants, arts institutions, specialty retail shops or otherwise contribute to the revitalization goals of the Plan. Consequently, the Third Circuit's Equal Terms analysis differed from the Eleventh Circuit's by factual necessity as much as philosophy.

Digrugilliers, supra, also does not present a genuine conflict. In *Digrugilliers* the Seventh Circuit reversed the denial of a preliminary injunction to the plaintiff church, which conducted religious services in a building leased in a C-1 zone forbidding religious uses without a variance. Unlike the Redevelopment Plan here, which does not define religious use, the zoning code in *Digrugilliers* defined a religious use as a church plus a residence, thus more expansively than secular uses in the zone. The actual use of the property in *Digrugilliers,* however, was for worship services only and there was no residential use associated with the church. The Seventh Circuit court held that that the city could not, by itself broadly defining "religious use" to bestow more rights upon churches than secular users, then justify excluding churches from a district, where, were it not for the "superadded rights," the exclusion would be discriminatory. However, the issue of "superadded rights" by definition of religious use is unique to *Digrugilliers* and is not at issue here.

Digrugilliers also addressed a protective zone established by a state liquor statue, which the Seventh Circuit cited as another example of discrimination in favor of religion that could not be a defense to a zoning exclusion challenged under RLUIPA. However, in *Digrugilliers* the Seventh Circuit observed that there was no evidence that any establishments were actually engaged in selling liquor thus the statute was an incidental concern only. Unlike *Digrugilliers*, the New Jersey liquor statute, N.J.S.A. § 33:1-76 which is implicated in this case is inextricably tied in with the zoning requirements of the Redevelopment Zone, a high end entertainment district with restaurants, nightclubs and similar establishments.

In another marked contrast, the liquor statute could be waived in *Digrugilliers*. Here N.J.S.A. § 33:1-76 prevents any waiver in perpetuity, expressly limiting the period of waiver to the renewal of the liquor license. Lighthouse therefore cannot become "similar" to non-religious assemblies/institutions by agreeing to waive N.J.S.A. § 33:1-76. Also, Lighthouse could operate as a church at 162 Broadway only if the Redevelopment Plan was amended to open the district to all religious entities. Waiver would have to be obtained from every religious entity which located in the district. Lighthouse, as well as other religious organizations permitted by amendment would essentially wield veto power over local liquor licensing within the Arts and Entertainment Zone as to both the renewal of existing licenses and the licensing of new businesses. It is unlikely that any business would thrive, much less open under this condition and this would this be the death knell for

proposed development. Such an arrangement would also excessively entangle church and state.[8]

Contrary to Lighthouse's arguments regarding the impact of N.J.S.A. § 33:1-76, the Redevelopment Plan prohibits schools as well as religious institutions in the subject sector. The statute N.J.S.A. § 33:1-76 applies to "schoolhouses" as well as churches. A culinary institute is in no way equivalent to a schoolhouse in terms of the aims or objectives of the Redevelopment Plan and no value judgment is made preferring a non-religious entity over a religious one.

There is also no conflict between the Circuit courts because so few have examined the issue of appropriate secular comparators in the RLUIPA's Equal Terms context. As a consequence, most Circuits have not weighed in on this evolving issue. The case law is undeveloped and review would be premature. If a genuine divide exists as to any provisions of RLUIPA, it is in the Substantial Burden prong at § 2000cc(a) which is not at issue here, and such a case would be far more appropriate for review than this one.

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[8] *See Larkin v. Grendel's Den*, 459 U.S. 116, 103 S. Ct. 505, 74 L. Ed. 2d 297 (1982) (Massachusetts statute, which effectively permitted governing bodies of churches and schools to veto applications for liquor licenses within a 500-foot radius of the church or school, violated the Establishment Clause of the First Amendment).

III. The Third Circuit correctly affirmed the denial of the Free Exercise claim in accordance with current constitutional jurisprudence in that Lighthouse produced no evidence that its religious exercise was burdened or restricted by its exclusion from the Redevelopment Zone, and, because the Redevelopment Plan is a neutral regulation of general applicability which survives rational basis review.

This Court has held that the government may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers. *See Smith, supra*; *Rector, Wardens and Members of Vestry of St. Bartholomew's Church v. The City of New York*, 914 F. 2d 348 (2d Cir. 1990) (citing to *Smith, supra*). Therefore, the right of "Free Exercise" does not exempt an individual with the obligation to comply with a valid and neutral law of general applicability which prohibits conduct that a state is free to regulate. *Congregation Kol Ami v. Abington Township*, 309 F. 3d 120, 139 (3d Cir. 2002). Zoning regulations which incidentally affect religious exercise, are neutral laws of general applicability which do not infringe upon the free exercise of religion. *See Mount Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991); *Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221 (9th Cir. 1990), *cert. denied*, 498 U.S. 999 (1991).

The Third Circuit held that the Redevelopment Plan did not violated the Free Exercise clause, reasoning, in conformity with prevailing Free Exercise

case law, that Lighthouse failed to show a restriction on its religious exercise as opposed to simple economic convenience. *See Braunfield v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L. Ed. 2d 563 (1961). The record bears out the fact that Lighthouse did not articulate any burden caused by its exclusion from a small downtown area in the City, must less a restriction on its free exercise of religion.

As the Third Circuit aptly noted, Reverend Brown testified at deposition that he could "move four more blocks and continue to serve the population that [he was] concerned about." (App. p, 462). Reverend Brown testified that there is no compelling reason for the church to be located at 162 Broadway and that a suitable alternative location would be agreeable. (App. pp. 603, 604, 606). Reverend Brown has acknowledged that another suitable site for Lighthouse could be found; when asked for a compelling reason why Lighthouse must locate at 162 Broadway, Reverend Brown stated that he did not "make that it's the only location" for Lighthouse, and that "nothing is etched in stone" thus that he would not have any compelling objection to another location. (App. pp. 603, 604, 606). The analysis truly ends here. At the most, the Plan only incidentally affected or inconvenienced Lighthouse which can operate as a church within 90% of the City limits which Lighthouse itself acknowledged would be an acceptable solution. As it has throughout this litigation, Lighthouse simply cites cases and avoids the facts.

The Third Circuit court further held that even if a constitutionally cognizable burden existed, the Plan was a neutral law of general application and survives rational

basis review. The Plan has as its purpose the promotion of economic revitalization not the impairment or prohibition of certain speech. *See Smith, supra.* The Plan is plainly neutral in that it does not specifically prohibit conduct because it is undertaken for religious purposes and there is no evidence that it was developed or implemented with the purpose of infringing upon or restricting religious practices. *See Lukumi, supra*, 508 U.S. 520 at 537-38 (law whose object is to infringe upon religious practices is not neutral). The Plan is generally applicable because its prohibitions apply to *all* uses which do not further the City's redevelopment objectives to revitalize the downtown area into a vibrant high-end entertainment destination, not just religious ones. *Lighthouse*, 510 F. 3d at 276; *See Tenafly, supra* (law which prosecutes conduct when primary motive is religious, is not generally applicable). In addition to churches, the Plan does not allow civic assemblies such as schoolhouses (which also implicate liquor licensing pursuant to N.J.S.A. § 33:1-76), government buildings, athletic facilities and alternative use venues. The City pursued its aims evenhandedly and Lighthouse was under the same constraints and procedures as non-religious entities seeking an RFQ, RFP, non-permitted use or amendment.

The Third Circuit properly rejected Lighthouse's assertion that City's land use regulation involved "individualized exemptions" which required strict scrutiny review. The Court observed that in its earlier *Blackhawk, supra*, its concern was not the fact that an exemption procedure or opportunity for discriminatory application existed, but rather, that the Commonwealth could not explain what justified the exemption other

than the religious motivation of the conduct. The Third Circuit instead looked to *Grace United Methodist Church*, 427 F.3d 775 (10th Cir. 2005) in which the Tenth Circuit refused to adopt a per se rule requiring that any land use regulation which permits a secular exception satisfy a strict scrutiny test. *Lighthouse*, 510 F. 3d at 277, 278. The court in *Grace Church* held that land use regulations are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances, if they are motivated by secular purposes and equally impact all land users seeking variances.

Here the existence of a procedure to amend the Plan does not make it less than generally applicable; the guidelines require that any amendment be accompanied by an ordinance which specifies the relationship of the proposed changes to the goals and objectives of the Plan. (App. p. 277). The Plan's application procedure makes no value judgment and does not inquire into the reason for the conduct or de-value religious reasons for use of the land. The Plan also actively prohibits non-religious land uses that endanger the City's interests and goals in the Redevelopment Zone. There is also no evidence here that any local assessment procedure was carried out in a manner as to discriminate against Lighthouse; indeed Lighthouse's RFQ application failed to even conform to the requirements of the Redevelopment Plan and omitted crucial financial information.

Consequently even if the Plan, arguendo, did burden Lighthouse's "free exercise," it is subject to rational basis review, not strict scrutiny. The Plan easily survives a rational basis assessment; it is reasonable

and not arbitrary and bears the required rational relationship to a permissible and legitimate state objective, the revitalization of the formerly blighted downtown Long Branch pursuant to the Redevelopment Plan. *See Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S.Ct. 1536, 39 L. Ed. 2d 797 (1974). However even if the Plan was subject to strict scrutiny review, the City has established that it serves a compelling governmental interest and are the least restrictive means of doing so.

This Court is therefore urged to deny review of Lighthouse's Free Exercise claim.

IV. This case is a poor vehicle for a decision of national importance, in that its distinctive facts, the nature of the land use regulation involved and the court's specific reliance upon a New Jersey state statute render it unsuitable for wide application and because numerous factual issues, such as whether Lighthouse is actually a valid church, remain unresolved and cloud the record.

As set forth above, the Third Circuit's decision is legally sound and poses no conflict with prevailing jurisprudence. This case is unsuitable for a decision of nationwide application for other reasons. The outcome of this case is of interest only to the parties. Its distinctive facts render it non-universal in scope. This case involves a comprehensive Redevelopment scheme, validated by legal judgment, which contains development goals affecting the quality of life city-wide. This is not a run-of-the mill zoning ordinance or "secular assembly vs. non-secular assembly" case.

The case also turned in large part upon the interplay between the provisions of a New Jersey statute, N.J.S.A. § 33:1-76 and the specific development goals of the Redevelopment Plan. The facts developed in connection with this issue established that placement of a church would destroy commercial development of the Broadway block of this sector, a high volume, high-end recreation and entertainment district, because of N.J.S.A. § 33:1-76 which prohibits liquor sales and licenses within 200 feet of a church. (App. pp. 567, 568). When the record is examined, Lighthouse 's position has no factual support; Lighthouse's evidence consists only of Petitioner-Plaintiff Reverend Brown's self-serving testimony and certifications and Lighthouse's melodramatic allegations against the City.

Additionally, numerous unresolved factual issues cloud the record. The issue of whether Lighthouse is actually a valid religious entity remains unresolved. The Third Circuit did not make an explicit factual determination that Lighthouse was a church, rather, the Third Circuit held that Ordinance 20-6.13 violated RLUIPA and remanded to the District Court for Lighthouse to prove damages, if any, for a closed period. In fact, the record here suggests that at most Lighthouse is a soup kitchen. Lighthouse has never presented evidence that it exists, operates or could operate as a church as it fancifully envisions. There is no evidence of a congregation or such religious activities as worship services. Lighthouse has stated here that it has never operated as a church. Lighthouse has further conceded that it never applied for or obtained tax exempt status as a religious institution during the period relevant to this litigation. Lighthouse did not even own

162 Broadway until October 16, 2007 when a corrective deed was filed.[9]

Lighthouse's status as a church is presently at issue in the related Tax Court litigation in which the connection between Lighthouse's finances and Reverend Brown's personal expenditures are presently under close scrutiny. The Tax Court Litigation is also significant in that Lighthouse has made of-record contrary assertions and statements concerning the "church" use of 162 Broadway. In the instant RLUIPA and Free Exercise litigation Lighthouse alleged that the City *prevented it from using* 162 Broadway as a church, at one point seeking a preliminary injunction. In the presently pending Tax Court Litigation, however, Lighthouse presents the diametrically opposed assertions that it *has been using* 162 Broadway as a church during the relevant period and is thus entitled to a tax exemption.

This case is an imperfect vehicle for certiorari for other reasons. Reverend Brown has testified that there is no compelling reason for the church to be located at 162 Broadway and that a suitable alternative location would be agreeable; this concession hardly makes a compelling fact pattern. Lighthouse is no model applicant and has repeatedly submitted incomplete, noncompliant and abandoned applications for use, which it then blames the City for denying. Lighthouse's RFQ application, for example, omitted the required financial

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[9] This information is of record in the Third Circuit as it was included in the City's Opposition to Lighthouse's Motion For Stay (Exhibit "C," para, 4, 5).

information such as the ability to pay for the costs of the project, which Lighthouse describes differently in every legal pleading and which exists solely in Reverend Brown's fantasies.

Additionally, Lighthouse's claims in its Petition for Writ of Certiorari, concern the period in which the City has been legally authorized by final court judgment to acquire 162 Broadway through eminent domain and the City will provide fair market value through the appraisal process authorized by New Jersey state law. *City of Long Branch v. Lighthouse Mission, et al.*, Superior Court of New Jersey, Monmouth County- Law Division, No. MON-L-4778-07 (April 2, 2008). Lighthouse is not exempt from the City's general eminent domain power because RLUIPA does not confer a defense to the condemnation of property in this case and eminent domain is not a land use regulation under RLUIPA as either a zoning or land marking law. 42 U.S.C. § 2000cc(a)(1); -5(5). *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005)(town's eminent domain proceedings did not constitute a "land use regulations" for purposes of the RLUIPA or application of a zoning law). Additionally, the Third Circuit has already given Lighthouse its day in court to prove compensatory damages for alleged RLUIPA deprivations for a period pre-dating the Redevelopment Plan, through remand. The issue of whether Lighthouse is a "church" will be before the District Court in the plenary hearing.

In sum, the Third Circuit's decision represents sound legal jurisprudence which raises no conflicts

requiring review by this Court in either the Equal Terms or Free Exercise context. The caselaw as to the issues raised here would benefit from further development prior to intervention by this Court, even were it warranted. This case is also an inappropriate choice for a decision of national importance because of its unique fact pattern and its outcome is of interest only to the parties. This case is also clouded by significant unresolved factual issues and is one of many in which Lighthouse and the City of Long Branch are opposing parties and in which Lighthouse has made assertions directly contradicting its allegations here.

CONCLUSION

For the foregoing reasons, Respondent-Defendant the City of Long Branch respectfully requests that the Petition for A Writ of Certiorari filed by the Petitioners-Plaintiffs, be denied.

Respectfully submitted,

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